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# In the Supreme Court of the United States

OCTOBER TERM, 1950

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No. 183

JAMES P. FINNEGAN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

*v.*

DIMMITT-RICKHOFF-BAYER REAL ESTATE COMPANY

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

The Solicitor General, on behalf of James P. Finnegan, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered in this case.

**OPINIONS BELOW**

The District Court filed no formal opinion but expressed its views in a letter addressed to the United States Attorney, a copy of which was transmitted to respondent's counsel (R. 114–

115).[1] The opinion of the Court of Appeals (Supp. R. 73–82) is reported at 179 F. 2d 882.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1950 (Supp. R. 82). Time within which to petition for writ of certiorari was extended until July 8, 1950, by order of this Court dated May 2, 1950 (Supp. R. 84). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

## QUESTION PRESENTED

Whether respondent's real estate salesmen are its employees within the meaning of the provisions of the Federal Unemployment Tax Act contained in Sections 1607 (b), (c), and (i) of the Internal Revenue Code.

## STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are set forth in the Appendix, *infra*, pp. 24–27.

## STATEMENT

Respondent, hereinafter called the "Company," brought suit for recovery of taxes assessed and collected under the Federal Unemployment Tax Act for the years 1943 and 1944 on the remuneration received by the Company's salesmen. Re-

[1] The record consists of a separately bound "Record" and "Supplemental Record." The designation "R." will be used for reference to the former and the designation "Supp. R." for reference to the latter.

covery was sought on the ground that the salesmen were not employees of the Company. (R. 2–10.) The District Court held that the salesmen were employees and denied recovery. (R. 114–115, 118–120.) On appeal, the judgment of the District Court was reversed. (Supp. R. 82.)

The facts are reflected by uncontradicted evidence, which may be summarized as follows:

The Company is a Missouri corporation engaged in the general real estate brokerage business and particularly in the sale of private residences. It operated with the aid of salesmen each of whom signed a written contract like that set forth in the record at pages 55–58 (R. 14–15.)

Under the written contract the Company agreed to make available to the salesman its office facilities and all current listings of real estate for sale, except such as the Company might find it expedient to place exclusively in the temporary possession of some other salesman, and agreed to assist the salesman in his work by advice, instruction, and full cooperation in every way possible. The salesman agreed to work diligently to sell, lease, or rent any and all real estate listed with the Company, to solicit customers of the Company and additional listings of real estate for sale, to otherwise promote the business of serving the public in real-estate transactions, and to conduct his business and regulate his habits so as to maintain and increase the good will and reputation of the Company. Both parties agreed to conform to and

abide by all laws, rules and regulations, and codes of ethics binding upon and applicable to real-estate brokers and real-estate salesmen. For his work, a salesman was to receive a proportionate share of the commissions charged for any service he performed, the commission to be divided between the Company and the salesman in accordance with an established schedule of commissions attached to the contract. The Company was not to be liable to the salesman for any expense he incurred, but expenses necessarily paid from commissions were to be paid in the same proportion provided for the division of commissions. The contract was terminable at will by either party and stated that the salesman should be construed to be a subagent only with respect to clients and customers for whom services should be performed and should otherwise be deemed to be an independent contractor and not a servant, employee, or partner of the Company. (R. 55–58, 116–117.)

When a salesman signed this contract with the Company, he was furnished with a copy of a manual entitled "Established Policies and Suggestions of Dimmit Rickhoff Bayer R. E. Co., Inc." (R. 82, 98), a copy of which is contained in the supplemental record at pages 5–32. This manual was described by Mr. Sargent, one of the sales managers of the Company, as "just a little glorified contract" to which the Company "could have different rules or things added any time they wanted to." (R. 78.) Another witness, a

former saleswoman for the Company and now a real estate broker (R. 82), described the manual as "a book of instructions, what to do and what not to do" (R. 99; see also R. 109). The District Court found it to be a "booklet of the plaintiff's rules and regulations" (Fdg. 4, R. 117) and the Court of Appeals regarded it as "the plaintiff's instructions for the guidance of the salesmen, with which they were expected to, and did, comply in conducting business" (Supp. R. 80).

The nature of the relationship between the salesmen and the Company, as disclosed by the contract, the manual, and the testimony and other exhibits, may be summarized in the following terms:

The salesmen were paid on a commission basis, receiving a percentage varying from 10 to 50 percent of the gross commission received by the Company in connection with a sale. The percentages varied with the degree of participation of the salesman in a particular sale (Supp. R. 13). The entire commission on a sale was collected by the Company which issued a monthly check to each salesman for his share of commissions collected during the previous month (R. 21, 45, 46, 49, 90). In addition an annual bonus was paid to salesmen who were with the Company at the end of the year, computed on a graduated percentage scale based on the amounts paid to the salesman during the year (Supp. R. 14). Bonuses were paid out of general funds of the company

derived from the Company's share of commissions received during the year (R. 44–46).

The Company maintained an office with appropriate furnishings and staff and provided the salesmen with desk space, telephone and switchboard service, stenographic help, Company stationery, business cards bearing the names of the Company and of the salesman, advertising material and listing data (R. 16, 19, 30, 105–106, 107). Many of the salesmen owned their own automobiles and used them in connection with their activities for the company, but there was no requirement that an automobile be furnished (R. 16–17, 40, 51, 117). The salesmen paid their own expenses and business and occupational taxes and fees (R. 26, 77, 102, 117). They had no drawing or expense accounts but on occasion could obtain an advance against future commissions (R. 21, 41).

Salesmen were not required to work any specific hours.[2] They were, however, instructed to call the Company's office at least twice a day and to leave word where they could be reached when out of the office (Supp. R. 29). They were admonished not to "spend any more time than absolutely necessary in the office before or after

[2] While some of the salesmen worked seven days a week, others worked part time, spending the rest of their working time as housewives or on business activities unconnected with selling real estate (R. 17–18, 91, 105). Most had been with the Company for a number of years (R. 52–53, 65, 92, 104).

regular office hours" (*ibid*). Qualified full-time salesmen were assigned to "floor duty," which involved keeping the office open on Saturday afternoons, Sundays and holidays (Supp. R. 17); the person so assigned operated the office switchboard (R. 103).[3] Weekly sales meetings were held in the Company's office (Supp. R. 16); although salesmen were not in terms required to be present (R. 117), they were expected to do so (R. 19, 34–35, 74).

Salesmen were under the supervision of two sales managers. These managers were leading salesmen who had their regular work and also supervised and assisted a group of other salemen, receiving an overriding commission on the sales of that group (R. 47–48, 74). The extent of that supervision may be indicated by setting forth the manner in which the Company conducted its business of selling real estate. That business may be divided into three steps; obtaining a "listing" (i. e., a contract giving the company exclusive rights to sell a particular property), obtaining a purchaser and getting a contract of sale executed, and "closing" (i. e., making the actual transfer of title documents with attendant adjustments of taxes and financing, etc.).

[3] The Sunday floor duty was generally regarded as desirable; a person taking it was required also to take the Saturday duty whether or not he so desired (R. 17, 35, 93–94, 110–111).

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Listings obtained by salesmen were reflected in contracts executed on forms supplied by the Company; after execution the contracts were required to be submitted to a sales manager for acceptance (Supp. R. 19). When accepted, they became the "property of the company" and the salesman was admonished that "they should be turned in immediately upon completion and should not be carried around or retained in your desk under any circumstances" (*ibid*). No listing contract could be canceled without the approval of the sales manager. (Supp. R. 20.) The Company reserved the right, in the sole discretion of the sales manager or the general manager, "to reject listings taken at excessive prices or which may in any other way be detrimental to your or the company's best interests" (Supp. R. 21).

For procuring a listing, a salesman received a stated percentage of the company's gross commission. Properties received for listing through inquiries made at the office were assigned to a particular salesman or to the Company, in accordance with Company regulations. (Supp. R. 13, 17.) Once a listing had been obtained, the information relating to it was given each salesman (Supp. R. 20), the listings were discussed at the weekly sales meeting (Supp. R. 16), and inspection tours of listed properties were arranged by the Company in its discretion to familiarize the salesmen with those properties (Supp. R. 16–17).

Salesmen were required to report immediately to their sales manager any changes in listing information. (Supp. R. 21.)

"For sale" signs furnished by the Company and bearing the Company's name only were placed on listed property (Supp. R. 18; R. 93). Special signs could be ordered "on approval of your sales manager" (Supp. R. 18). Unsightly signs were to be reported to the sales manager (Supp. R. 19). All newspaper advertising was required to be submitted to the sales manager for approval (Supp. R. 18). Such advertising was also in the name of the Company and did not indicate the name of any particular salesman (R. 93, 106).

Any offers to purchase property were required to be submitted to the salesman who procured the listing, and by him to the seller (Supp. R. 23). Salesmen were instructed to submit all offers to the seller "as soon as possible" (*ibid.*). They were further instructed that "All offers should, if possible, be submitted to your sales manager for approval, before submission to your seller" (*ibid.*). They were told not to leave written offers with the seller (Supp. R. 22).

Sales contracts were likewise required to be executed on forms supplied by the Company, and to be submitted to the sales manager for acceptance, upon which they became company property. They could be cancelled only with the sales manager's approval. (Supp. R. 19, 20.) Sales-

men were instructed that "Earnest money must be obtained on every sale. It is advisable to procure as much earnest money as possible." (Supp. R. 23.) Earnest money was intended to "protect the collection" of the Company's commission in the event the purchaser refused to close the sale. The Company reserved sole discretion to divide earnest money with the seller even where such action might not leave enough to cover the commission. (Supp. R. 23–24.) Earnest money could not be refunded without the approval of the sales manager. (Supp. R. 24.)

The commission charged by the Company was fixed in accordance with a schedule adopted by the St. Louis Real Estate Exchange and deviation from that schedule could not be made without the "specific consent" of the sales manager (Supp. R. 13). Salesmen were instructed that "All commissions must be paid in cash unless otherwise authorized by your sales manager." (Supp. R. 15.) The Company's manual further provided that—

> Allowances, deductions, and charge-backs [f]rom commissions should be approved by your sales manager prior to closing deal; only in unavoidable cases may deductions or allowances be charged back to commissions after deal is closed and then only with sales manager's approval. [*Ibid.*]

The Company, however, reserved the right to refund commissions or make allowances or adjustment payments at or after closing the deal and might take such action without the consent of the salespersons involved "when the company believes it to be to the best interest of such salesperson or the company" (*ibid.*).

If a salesman sold or traded property which he himself owned he was required to pay the usual rate of commission to the Company, and would share in that commission as if he had not been a principal in the transaction. (Supp. R. 15–16).

Closing of deals was made by the Company's closing department. Salesmen were given detailed instructions as to the information to be given that department and their clients and were requested to be present at the closing in order to indicate to the client their interest in his welfare (Supp. R. 24–25). Escrows were handled by the closing department. Salesmen were instructed that they had "no authority to sign escrow or other agreements committing the company unless specifically authorized to do so by the sales manager." (Supp. R. 26.)

Salesmen were given certain instructions as to the conduct of their negotiations with clients. Thus they were admonished "to refrain from discussing race, religion, or politics with your clients," to "use caution in locating a family in a neighborhood where they will not be welcome"

(Supp. R. 29), and to exercise extreme care in making comments in the presence of an owner. (Supp. R. 30). "The use of alcoholic drinks during business hours" was "strongly discouraged" (Supp. R. 29). They were instructed that "No person should promote special business such as community developments, subdivisions, building promotions, or cooperative projects without first obtaining the approval of your sales manager" (Supp. R. 27).

All outgoing telegrams or phone calls were required to be approved by the sales manager (Supp. R. 28–29). Salesmen were instructed to refrain from writing or signing any letter, agreement or document of any sort which in any way committed the company without the consent of the sales manager and to submit to the sales manager all letters or written instruments drawn or signed by them as representatives of the company (Supp. R. 28). In general salesmen were not instructed whom to contact to secure business. (R. 18). On at least one occasion, however, one of the sales managers instructed salesmen to go into certain sections of the city to ring door bells and try to get listings (R. 105, 109–110). They were also supplied form letters on company stationery for soliciting business (R. 105). Legal matters were required to be presented to the sales manager and would be submitted to the company's counsel only with the sales manager's

permission (Supp. R. 28). If a saleman was requested to act as receiver, trustee, etc., or to serve as an appraiser, or summoned to testify as a witness in court, he was instructed to discuss the matter with his sales manager (*ibid.*).

Other instructions, often in minute detail, were given as to the conduct of the salesmen's activities. For example, the Company's manual said: "Give your clients receipts for every paper you are entrusted with" (Supp. R. 25). "Keys should never be given to purchasers without the written consent of the sellers until after the final closing of the deal." (Supp. R. 28.) "Be sure phone numbers and addresses of all parties are shown on contracts" (Supp. R. 25).

The salesman's contract with the company was terminable at will by either party (R. 58). Severance of the salesman's connection with the company destroyed his right to any participation in a commission arising out of a deal unless the contract of sale was completely signed by all parties prior to the severance of connection. It also forfeited the salesman's right to any listings. (Supp. R. 32.) It further forfeited his right to any bonus (Supp. R. 14).

The manual provided that:

> The company reserves the right of sole discretion in the settlement of commission claims, disposition of earnest money deposits, cancellation of contracts, institution

> or dismissal of legal actions, allowances out of commissions, settlement of controversies, etc. [Supp. R. 31.]

Its officers reserved "the right to determine company policy" and their decisions in all matters of dispute were to be "accepted as final" (Supp. R. 27).

The manual provided that changes and additions could be made to it from time to time and salesmen were instructed to keep their books available for that purpose (Supp. R. 32). Memoranda containing instructions and regulations were issued on occasion to the salesmen (R. 86–89).

### REASONS FOR GRANTING THE WRIT

(1) Under the applicable statutory provisions the salesmen were employees unless they had the "status of an independent contractor" "under the usual common-law rules applicable in determining the employer-employee relationship" (Internal Revenue Code, Section 1607 (i); see Appendix, p. 24, *infra*). In applying those rules it is well settled that—

> the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done."

(*Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518, 523).[4]

The facts in this case show that, except as to their hours, provision for their own transportation and their sales talk, the work of the salesmen here involved was controlled in every respect by the Company. The Company retained complete control over the terms of all contracts, the amount of the Company's commission, and the salesman's share therein. The Company could reject any listing of property for sale and any offer of purchase. All contracts were on forms furnished by it and had to be approved by its sales manager. The amount of the commissions charged was fixed and the Company controlled any departure from the rate fixed, and any agreement to accept deferred payment or make any adjustment or chargeback. Indeed it could, without consulting

[4] This test has been adopted in the applicable Treasury Regulations (Appendix, p. 25, *infra*), which provide in part:

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so."

These regulations have been described as an elaboration of the common law rule, *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 717–18 (C. A. 2).

the salesman, agree to an adjustment which could have the effect of reducing the remuneration payable to him. Correspondence was conducted and advertising taken out in the name of the Company alone. The salesman had no right to carry any particular transaction through to completion. Having procured a seller he was required to make all information concerning the property available to other salesmen, one of whom might procure a purchaser and thereby share in the commission; the "closing" of the sale was taken out of the salesman's hands entirely. Even in the actual negotiations with clients the salesman was obligated to so conduct himself and regulate his habits as to "maintain and to increase the good will and reputation" of the Company, and this obligation was implemented by specific instructions to refrain from using alcohol, to avoid discussing race, politics or religion, to refrain from commenting on the property in the presence of the buyer or seller, to "use caution in locating the family in a neighborhood where they would not be welcome", etc. He could not promote certain kinds of business without his sales manager's approval, and he was apparently subject to being ordered to solicit business in a specified part of the city by door-to-door canvass. While the nature of the business did not permit detailed check on his hours of work he was required to call the office twice a day, and expected to attend a weekly sales meeting. He could be discharged at will by

the Company and upon severance of his connection with the Company he lost any rights to prospects and clients procured by him, and to information obtained by him for the Company. Beyond these existing requirements, he undertook to abide by any additional regulations the Company might adopt.[5]

We think it clear that these facts satisfy the control test of the common law as reflected in the Treasury Regulations. Indeed the control here possessed by the Company is no less than that of the Singer Company over its travelling salesman in *Singer Manufacturing Co.* v. *Rahn, supra.* Nothing in the Joint Resolution of June 14, 1948, 62 Stat. 438, contains any suggestion that Congress intended to exclude from coverage persons who were in fact subject to the employer's right to control. On the contrary, Congress, although repudiating any attempt by Regulation to go beyond the common law test to a formulation deemed vague and all-inclusive, clearly recognized and approved the existing Treasury regulations

[5] The fact that the salesmen were described as independent contractors in their agreement with the Company is immaterial. *United States* v. *Silk*, 331 U. S. 704, 715; cf. *Bartels* v. *Birmingham*, 332 U. S. 126. Likewise without significant force is the fact that they were on a commission rather than a salary basis. The statute defines "wages" as meaning "all remuneration for employment" (Sec. 1607 (b)), and the Regulations declare that "salaries, fees, bonuses, and commissions are wages within the meaning of the Act if paid as compensation for employment" (Sec. 403.227).

(which were substantially identical with those now in force). See H. Rep. No. 1319, 80th Cong., 2d Sess., pp. 1–2; S. Rep. No. 1255, 80th Cong., 2d Sess., pp. 2, 3. Indeed the Senate Report on the Resolution emphasizes that the common law tests must be "realistically applied" (S. Rep. No. 1255, *supra*, p. 2) and "should not be narrowly applied" (*id.*, p. 17).

The decision of this Court in *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, 331 U. S. 704, does not support the result below. The truck owners there not only had made a substantial capital investment in the trucks but also hired their own assistants, with whom the trucking company had no dealings of any kind. Moreover in the *Silk* case the truckers were "not instructed how to do their jobs" (331 U. S. at 707) and although there was in the *Greyvan* case a manual of instructions which purported to regulate in detail the conduct of the truckmen "the company official testified that the manual was impractical and that no attempt was made to enforce it" (331 U. S. at 710). In the present case the salesmen made no capital investment other than the license fees required of them; the use of their own cars was a personal convenience and not a company requirement. (See R. 40.) And, as pointed out above, the very detailed regulations embodied in the company manual were regarded as binding.

While the decision of the Court of Appeals for the Ninth Circuit in *Broderick* v. *Squire*, 163 F.

2d 980, lends some support to the result below, the opinions in that case do not indicate that the real estate brokers there involved were subject to such detailed regulations and control as is here shown. To the extent that it supports the result below that decision would seem to be inconsistent in principle with *Atlantic Coast Life Ins. Co.* v. *United States,* 76 F. Supp. 627 (E. D. S. Car.) and *Stone* v. *United States,* 55 F. Supp. 230 (E. D. Pa.), involving life insurance salesmen and securities salesmen respectively. Compare *National Labor Relations Board* v. *Phoenix Mutual Life Ins. Co.,* 167 F. 2d 983 (C. A. 7), holding that the life insurance salesmen there involved were employees and not independent contractors within the National Labor Relations Act as amended by the Taft-Hartley Act.[6]

(2) We would not ask this Court to review this case merely because of what we regard as an error in the application of the common law test by the court below, or because of its effect on the salesmen or the company involved in this case. The

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[6] *Brown* v. *Luster,* 165 F. 2d 181, 184–5 (C. A. 9), and *McGowan* v. *Lazeroff,* 148 F. 2d 512 (C. A. 2), cited by the court below, involved salesmen of merchandise; in both control was sought to be shown primarily from the right to terminate the relationship at will and (in the *McGowan* case) the right to fix the sale price. Thus in the *McGowan* case the court said "The absence of a supervisory power to control the method and detail of performance is the significant factor" (148 F. 2d at 513). *Radio City Music Hall Corp.* v. *United States,* 135 F. 2d 715 (C. A. 2), involved vaudeville acts.

case is an important one with respect to the coverage of the Unemployment Tax Act and of the cognate old-age and survivors insurance provisions of the Social Security Act. In view of the detailed showing made on this record of the supervision and control exercised by the Company over every phase of the salesmen's activities, the holding below must be taken to be a holding that real estate salesmen, and other salesmen employed on a similar basis, cannot be held to be employees for purposes of these Acts.

As the record reflects (R. 62–63), the Government has been advised that this case is regarded by the National Association of Real Estate Boards as a test case for obtaining an adjudication nationally applicable to real estate salesmen. The Bureau of Internal Revenue and the Federal Security Agency have advised us that there are at least 150,000 real estate salesmen in the United States, who are now generally regarded as within the coverage of these provisions, in the absence of exceptional circumstances, and that acceptance of the decision below would result in the exclusion of substantially all such salesmen from these provisions. On the basis of the decision below, the Bureau may anticipate claims for refund in the neighborhood of $2,000,000 for unemployment compensation taxes already paid on the remuneration received by such salesmen. We are advised that the Employment Tax Unit of the Bureau already has on hand approximately 40 cases

involving real estate salesmen. Ten suits for refund of the federal unemployment tax paid on the remuneration received by real estate salesmen are now pending in the courts.[7]

The decision will have an impact extending far beyond the real estate field. Numerous other types of salemen operate on a commission basis and are not required to work specified hours but are nevertheless subject to substantial regulation and control by their company. The Federal Security Agency advises that approximately 19,000 security salesmen, over 100,000 wholesale and manufacturing salesmen, 96,000 industrial insurance salesmen, and approximately 6,000 life insurance salesmen are presently considered to be employees under the common law test. The decision below will undoubtedly be regarded as authority to question coverage of all such persons under the Social Security program.

It is important to the administrative agencies involved that the Court grant this petition. The decisions of the lower courts reflect confusion and

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[7] The cases are as follows: *G. W. Allen & Co.* v. *Henslee*, 86 F. Supp. 295 (M. D. Tenn.) (three consolidated cases); *Clifford L. Swan Co., Inc.* v. *United States* (D. Me.) (two cases); *McDonald & Co.* v. *United States* (N. D. Tex.); *Boss & Phelps, Inc.* v. *United States* (D. D. C.); *Merl Brewer Zimmerman* v. *Nee, Jamison and Connell, Collectors* (W. D. Mo.); *Picotte Realty, Inc.* v. *United States* (N. D. N. Y.); *Pomeroy Organization, Inc.* v. *United States* (N. D. N. Y.) (involving employees of four corporations); *McDonald-Hickey Real Estate Co.* v. *U. S.* (D. Minn.).

inconsistency in the application of the common law test for determining the existence of an employer-employee relationship. The 1948 amendment requiring use of that test was adopted principally for the purpose of reaffirming the pertinent existing Regulation which then and now (see Treasury Regulations 107, Sec. 403.204, *infra*, pp. 25–26) have generally been considered to constitute a statement of the common law test. See H. Rep. No. 1319, 80th Cong., 2d Sess.; S. Rep. No. 1255, 80th Cong., 2d Sess. Its purpose was to prevent extension of the Act's coverage to areas clearly excluded by the common law test; it reflects no suggestion that the common law test be given a restrictive application. Nevertheless, as the instant decision indicates (R. 81–82), the mere passage of the amendment appears to have resulted in decisions against coverage in cases where there normally would have been little question that the persons involved were employees under the common law test.[4] The result has been a whittling away of coverage for social security purposes which, if the decision below stands, will reach alarming proportions.

The amendments to the Social Security Act now before a congressional conference committee

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[4] Compare also such cases as *Party Cab Co.* v. *United States*, 179 F. 2d 87 (C. A. 7), certiorari denied, 338 U. S. 818; *Economy Cab Co.* v. *Fahs*, 174 F. 2d 321 (C. A. 5), certiorari denied, 338 U. S. 818; *New Deal Cab Co.* v. *Fahs*, 174 F. 2d 318 (C. A. 5), certiorari denied, 338 U. S. 818.

(H. R. 6000, 81st Cong., 2d Sess.) do not affect this case. Not only is their application merely prospective, but they would in no way affect the definition of employee in the Unemployment Tax Act, with which this case is concerned. Moreover, it is uncertain to what extent, if any, the application of the common law test to the old age and survivors insurance provisions would be affected for the future; the Senate bill, if accepted by the conference committee in this respect, would preserve that test as the dominant criterion of coverage, merely adding certain specific categories to the extent not already covered by the common law test.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

JULY 1950.

## APPENDIX

Internal Revenue Code:

SEC. 1607 [as amended by Section 614 of of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, and Joint Resolution 296, c. 648, 62 Stat. 438, Sec. 1]. DEFINITIONS.

When used in this subchapter—

(a) *Employer.*—The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(c) *Employment.*—The term "employment" means * * * any service, of whatever nature, performed * * * by an employee for the person employing him [with exceptions not herein relevant].

* * * * *

(i) *Employee.*—The term "employee" includes any officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2)

any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * *

(26 U. S. C. 1946 ed., Sec. 1607.)

Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act:

SEC. 403.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of section 403.201 (a), includes a person who employs one or more employees.)

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an in-

dividual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. * * *

* * * * *

SEC. 403.227. *Wages.*—* * *

* * * * *

The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions are wages within the meaning of the Act if paid as compensation for employment.

The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

* * * * *

SEC. 403.301. *Persons liable for tax.*—Every person who is an employer as defined in section 1607 (a) of the Act * * * is liable for the tax. Even if an employer is not subject to any State unemployment compensation law, he is nevertheless liable for the tax. However, if he is subject to such a State law, he may be entitled to certain credits against the tax * * *.

* * * * *

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No. 183.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

JAMES P. FINNEGAN, COLLECTOR OF INTERNAL REVENUE, PETITIONER,

*v.*

DIMMITT-RICKHOFF-BAYER REAL ESTATE COMPANY, RESPONDENT.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.*

## BRIEF FOR THE RESPONDENT IN OPPOSITION.

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION.

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## I.

## STATEMENT OF THE CASE.

### A. The Facts.

The Statement of Facts as set out by the Petitioner (pp. 2-14) is accurate in the main so no necessity for a lengthy recapitulation from the Respondent's viewpoint

is seen. It is noted with some interest that the Petitioner has taken some 332 lines of his printed petition and brief to set out the facts that the District Court disposed of in 106 lines and the Court of Appeals in 56. Although unnecessarily fulsome in quoting evidentiary details, no quarrel is found with the Statement except where it strays from the factual situation pertaining to ownership of commissions paid on sales made. For example (p. 5), it is stated, "The salesmen were paid on a commission basis . . ." and (p. 8) "For procuring a listing a salesman received a stated percentage of the company's gross percentage," etc. All the evidence showed that, when a sale was made of a listed property, the commission (fixed by a schedule adopted by the St. Louis Real Estate Exchange [p. 10]) was common property of the interested parties—the company, the salesman securing the listing, the salesman making the sale, mayhap a salesman associated with another company—split the melon. The percentage to which each was entitled was set out in the contract between the company and the salesman (Sup. R. 13). In short, the company "paid" the salesman not at all. He received his share of the fruits of his labor in a joint enterprise. There are a number of similar minor deviations not mentioned here as the concise factual situation is not felt to be too important in the present matter.

**B. The Question Presented.**

No quarrel is found with the Petitioner's statement of the Question Presented (p. 2). It would have been perhaps more accurately stated as, "Are real estate salesmen associated with respondent its employees within the meaning of the provisions of the Federal Unemployment Tax Act contained in Section 1607 (b), (c) and (i) of the Internal Revenue Code so as to make respondent liable for taxes on commissions collected by said salesmen?"

C. **Rulings of the Courts Below.**

The District Judge filed no written opinion, but set out to a limited extent his reasoning in a letter to the United States District Attorney (R. 114). He held the company retained the right to direct and control the means and methods of work by salesmen to the extent established by Treasury Regulations and required by common law, and hence they were employees. Judgment was entered for defendant.

Upon appeal the Court of Appeals for the Eighth Circuit reversed the judgment of the District Court and remanded the case with directions to enter judgment for the plaintiff. This decision was based upon an analysis of the decision of the Supreme Court in United States v. Silk and Harrison v. Greyvan Lines, Inc., 331 U. S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463, a decision of the Missouri Supreme Court in A. J. Meyer & Co. v. Unemployment Compensation Commission of Missouri, 348 Mo. 147, 152 S. W. 2nd 184, and the intent of Congress as shown by the congressional debate on the question particularly in the Reports of the Congressional Committee accompanying the Joint Resolution (U. S. Code, Congressional Service, Vol. 2, 80th Congress, Second Session, 1948, page 1752 et seq.). The Court concluded the salesmen were not employees within the meaning of § 1607 (i) of the Internal Revenue Code, as amended.

## II.

## ARGUMENT.

Petitioner asks that this Court issue its writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit entered in this case on two grounds: (1) That the salesmen were employees under the common-law test "realistically applied"; and (2) That the question involved is an important one to the administrative agencies involved in the coverage of the Unemployment Tax Act.

Respondent contends that no basis exists for granting the petition and urges a denial of the petition for the reasons set out below.

The Supreme Court rules enunciate clearly the basis on which a writ of certiorari will be granted. Reasons for granting a writ which patently do not exist such as presence or absence of an international question are not here discussed. Reasons for granting the writ present by implication will be examined only briefly.

### A. There Is No Conflict in Decisions.

The petition for certiorari in this case does not directly assert as a reason for granting a writ a conflict in decisions. However, in the first reason advanced, the petitioner by implication does suggest a possible conflict in decisions when it states (p. 17): "Indeed the control here possessed by the Company is no less than that of the Singer Company over its traveling salesmen in Singer Manufacturing Company v. Rahn, supra." Petitioner also states (p. 18) that the decision of the Eighth Circuit is not supported by the decisions of this court in United States v. Silk and Harrison v. Greyvan Lines, supra. It is admitted that the decision of the Court of Appeals of

the Eighth Circuit in Henry Broderick, Inc., v. Squire, 163 Fed. 2nd 980, "lends some support to the results below." Then it states that to the extent that the Broderick case supports the result below in this case (p. 19) the Broderick decision seems inconsistent in principle with the decisions in two district court cases there cited. Then, evidently for the purpose of raising a question of a possible conflict in cases, the petitioner cites National Labor Relations Board v. Phoenix Mutual Life Insurance Co., 167 Fed. 2nd 983. Of course the question involved in that case is the definition of employer-employee relationship under the National Labor Relations Act, 49 Stat. 449, Section 1 et seq. [29 U. S. C. A., Section 151 et seq.].

Petitioner's half-hearted attempts to suggest a conflict in decisions may be disregarded. Even a superficial reading of the decision of the court below shows that in principle the Eighth Circuit followed the test laid down in the Silk and Greyvan cases, which tests were approved by Congress in the Congressional debate on amendments to the Act. Senate Report No. 1255, supra, says, "The decisions of the Court in Silk and Greyvan Lines and Bartels, and the test, the moving principles by which the Supreme Court reached those decisions, were the usual common-law tests and principles realistically applied" (U. S. C. Cong. Serv., 1948, Vol. II, p. 1766). The Broderick case is squarely in point, and the same tests were applied. In addition thereto, petitioner overlooked a number of other decisions involving the same principles although concerned with businesses other than the real estate business. E. g., see Party Cab Co. v. United States, 172 Fed. 2nd 87; New Deal Cab Co. v. Fahs, 174 Fed. 2nd 318; Economy Cab Co. v. Fahs, 174 Fed. 2nd 321; Grace v. McGruder, 148 Fed. 2nd 679, inter alios.

B. **No Important New Question Is Raised.**

Part two of rule 38 of this Court provides, "Where a Circuit Court of Appeals . . . has decided an important question of Federal Law which has not been, but should be, settled by this court," that certiorari may be granted. There is no controversy in this case with respect to legal principles. The same principles that were applied by the Eighth Circuit in the instant case were applied by the Supreme Court in the Silk and Greyvan cases. In granting certiorari in 1946 in those two cases the Supreme Court stated, "Writs of certiorari were granted, . . ., because of the general importance in the collection of social security taxes of deciding what are the applicable standards for the determination of employees under the Act." United States v. Silk and Harrison v. Greyvan, supra (331 U. S., l. c. 705).

Congress has by the Social Security Amendment of June 14, 1948, reiterated their intent that "the usual common-law rules, realistically applied, shall continue to be used to determine whether a person is an 'employee' for the purpose of applying the Social Security Act," Senate Report No. 1255, 80th Cong., 2nd Sess., U. S. C. Cong. Service, p. 1752 et seq. The Appellate Court in the instant case even adopted in toto the test set out in the case relied on most heavily by the petitioner as well settling the test to be applied. In its decision it sets out, "The usual common-law rules for determining the existence of the relationship of employer and employee was concisely stated by the Supreme Court of the United States in Singer Manufacturing Co. v. Rahn, 132 U. S. 518, 523, as follows:" and then the Eighth Circuit proceeded to set out exactly the language quoted from that case on pages 14 and 15 of the Petitioner's Brief. See Dimmitt, Rickhoff, Bayer v. Finnegan, Collector, 179 Fed. 2nd, l. c. 883-4.

Of course the petitioner has not claimed in his petition that an important new question of law is involved, but the implication under the second reason advanced by the petitioner for granting the writ is clear. The gravamen of the argument advanced as the second reason for granting the writ is that the decision will have an impact extending far beyond the real estate field. This is not per se a claim advanced by the petitioner that an important new question of law is raised, but the inference is plain. It is also plain from an examination of the facts that the inference is unwarranted.

C. **Petitioner Merely Seeks a Review of the Evidence and a Rehearing.**

The petitioner under his first reason for granting the writ sets out in some detail a summary of the facts in the instant case (pp. 15, 16, 17). The facts had already been set out under his "Statement of the Case" in lengthy detail occupying some eleven pages of the petition. It is then argued, "We think it is clear that these facts satisfy the control test of the common-law as reflected in the Treasury Regulations" (p. 17).

The quarrel petitioner has with the Eighth Circuit decision in the instant case is not that the wrong tests were applied, but that the tests were wrongly applied. This is the error for which petitioner seeks redress. There exists a shadowland in business relationships that cannot be clearly illuminated as a whole by any court decision. Cases involving the legal effect of these relationships in relation to the Federal Unemployment Tax Act in our complex economical structure necessarily differ in their facts. The decision of a particular case must rest upon the particular facts shown in evidence to exist in that case. Given the facts in this case, the court below found the salesmen herein are not employees.

If certiorari should be granted, this court could not resolve any conflict in decisions because there is no conflict in the application of the tests applied in this case or in any other case. The conflict found by the petitioner arises from difference in states of fact. Certiorari here will not serve to decide any important principle of law. The correct principles of law were applied by the court below, and those same principles of law in view of the present wording of the law and the expressed Congressional intent must be applied to every other case arising under the Act for determination of whether the employer-employee relationship exists.

But the petitioner asks certiorari because "It is important to the administrative agencies involved that the court grant this petition" (p. 21). What the petitioner really wants is this court to pronounce that 150,000 real estate salesmen, 19,000 security salesmen, over 100,000 wholesale and manufacturing salesmen, 96,000 industrial insurance salesmen, and approximately 6,000 life insurance salesmen mentioned on page 21 of his brief are employees within the meaning of the Act. The petitioner fears that "a whittling away of coverage for social security purposes which, if the decision below stands, will reach alarming proportions" (p. 21).

This is entirely outside of the scope of any writ of certiorari based on the question presented to this court.

It is the desire of the petitioner, as this respondent reads the petition, that this court determine the effect of differences in factual details. In effect the petitioner urges certiorari so that this court may place a value—a significance—an appraisal upon each factual detail and each shade of reltionship involved whenever two men associate themselves for the purpose of doing business. The decision of the court in a case such as this is dependent upon a varied and multitudinous set of facts. If this court

should undertake the monumental mission of weighing, evaluating and classifying each fact involved in this case, and should determine a mathematical formula to be placed upon the importance, significance and relevancy of each of these facts so as to furnish a rigid rule for the application of the common-law test, the result strained for by the petitioner would still not be attained. The next case that arose for determination would present an entirely different set of facts, both in number and in combination. The petitioner then would stand before the bar of this Court and again ask certiorari so that this Court would again, perforce, sift, evaluate and tag the facts in that case. The spillways would be open so that this Court would be drowned in a flood of cases each demanding that the court review the facts and the evidence already determined by Appellate Court below.

There can be no doubt that the petitioner seeks a review largely because of what it regards as an error in the application of the common-law test by the court below. Supreme Court rule 38, supra, was never intended to provide for the issuance of a writ of certiorari because of a contention by a petitioner that the court below reached an erroneous result on the facts presented to it.

Certiorari is not granted by the Supreme Court in cases where the court below has afforded the petitioner a full hearing and where certiorari is sought for the purpose of re-examining the correctness of the results. Deputy v. duPont, 308 U. S. 488, 84 L. Ed. 416 (dissent). Certiorari is not granted merely to review the evidence, discuss specific facts or to pass upon inferences drawn from the evidence or facts. General Talking Pictures Corp. v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273; United States v. Johnston, 268 U. S. 220; Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413, Mr. Justice Holmes stated in United States of

America v. Johnston, supra, "We do not grant a certiorari to review evidence and discuss specific facts." See also Magnum Import Co. v. Coty, 262 U. S. 159, 163, 48 S. Ct. 531, 532, 67 L. Ed. 922, where the court stated, "The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

When the petition in the instant case is analyzed, it becomes obvious that what the petitioner seeks is a review of the evidence—a re-examination of the facts—a rehearing. The petitioner does not challenge the principles of law involved—he simply does not like the decision.

D. **The Proper Tests Were Applied in the Instant Case.**

An analysis of the opinion of the Eighth Circuit in the instant case is informative. It clearly shows that the tests and regulations followed by the Eighth Circuit were exactly the same as those urged by the petitioner.

Follow the Court's opinion. We find the Court starts off: "(1) The usual common-law rules for determining the existence of relationship of employer and employee was concisely stated by the Supreme Court of the United States in Singer Manufacturing Co. v. Rahn, . . .", Dimmitt, Rickhoff, Bayer v. Finnegan, 179 Fed. 2nd 883, 884. This is the exact statement of the proper test as set down under petitioner's first reason for granting the writ (p. 13). In the next paragraph the court continues as follows: "The applicable Treasury Regulations, which are on elaboration of the rule (Radio City Music Hall Corp. v. United States, 2 Cir., 135 Fed. 2nd 715, 717-718) are set out in the margin." The case then sets out exactly the same excerpt from Treasury Regulation No. 107 on page 884, supra, as the petitioner sets out on pages 25, 26, 27 in the Appendix to his petition. On page 885 of 179 Fed. 2nd, the court continues, "The question, as we see

it, is whether the plaintiff, in its contractual arrangement with its salesmen, retained the right to control the manner in which they did business."

Petitioner, after recounting his concept of the facts, arrives at the conclusion, "We think it clear that these facts satisfy the control test of the common law as reflected in the Treasury Regulation" (p. 17). The Eighth Circuit in its opinion stated that the Supreme Court of Missouri held "under the usual tests for determining the employer-employee relationship, salesmen such as those here involved are not the employees of their principal, but are independent contractors. A. J. Meyer v. Unemployment Compensation Commission of Missouri, 348 Mo. 147, 152 S. W. 2nd 184;" that "The Circuit Court of Appeals of the Ninth Circuit, in the case of Henry Broderick, Inc., v. Squire, 163 Fed. 2nd 980, reached the same conclusion with respect to real estate brokers whose relation to their principal, we think, differed in no controlling respect from the relation of the salesmen in the instant case to the plaintiff." The court continues on the same page (887), "An analysis of the opinion of the Supreme Court in the cases of U. S. v. Silk and Harrison v. Greyvan Lines, Inc., 331 U. S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757, indicates to our minds that a ruling that the plaintiff in the instant case, under its arrangement with its salesmen, had retained the right to control the manner in which they were to accomplish results, is not justified by the evidence. We think that the Greyvan Lines, Inc., as shown by the opinion of the Supreme Court, had and exercised far more control over the manner in which its truck operators, who were held to be independent contractors, did business than the plaintiff in the instant case had over the activities of its salesmen in soliciting listings and finding purchasers." The court then examines the intent of Congress as shown by its amendment to section 1607 (i) of the Internal Revenue Code (p. 888 of the opinion), which amendment is

set out in the Appendix to the petitioner's brief on pages 24-25. The court then concluded that under these tests, which are exactly the same tests advocated by the petitioner here as the proper test to be used, the salesmen in the instant case were not employees within the meaning of the act. The tests followed by the court were the ones urged as the correct test by the petitioner. The tests followed by the court were the proper tests.

E. **The Supreme Court Has Refused Certiorari Under Similar Circumstances.**

The Government sought certiorari in three recent cases involving the question contained in the instant case. These were cases in which a company sought to recover taxes collected under the Federal Unemployment Tax Act. They were Party Cab Co. v. United States, 172 Fed. 2nd 87; Economy Cab Co. v. Fahs, 174 Fed. 2nd 321, and New Deal Cab Co. v. Fahs, 174 Fed. 2nd 318. In all three of those cases certiorari was denied (338 U. S. 818).

While no reason was given by this Court in denying certiorari, an examination of the petitions in the three cases is of some interest. They are docketed as case Nos. 869-870-871 in the October term, 1948. The Government advanced as its reasons for granting certiorari in the New Deal Cab Co. case that it was a companion case to the Economy Cab Co. case, hence, if certiorari was granted in the Economy case, it should likewise be granted in the New Deal Cab Co. case. The Economy Cab Co. case was based on an alleged conflict between the decision of the court in the Fifth Circuit and the case of Jones v. Goodson, 121 Fed. 2nd 176, in the Tenth Circuit. Tossed in as additional argument was the statement that it and the Party Cab Co. case effected the rulings of the Bureau of Internal Revenue as to status of 136,000 cab drivers. It even found a conflict between the decision of the court in

the Fifth Circuit in the Economy Cab Co. case and the court in the Seventh Circuit in the Party Cab Co. case, supra, although both of those cases were decided in favor of the company and the same common-law tests were applied.

In the Party Cab Co. case the argument was advanced that, if the court granted certiorari in the Economy and New Deal Cab Co. cases, it should also grant certiorari in the Party Cab Co. The same status of the same 136,000 cab drivers was again viewed with alarm by the Bureau of Internal Revenue in the Party Cab Co. case. Any factual distinction between the holdings of the court in the various cases was brushed aside by the simple statement, "the basic plan is the same" (p. 7, Petition for Writ in United States v. Party Cab, No. 871, October term, 1948, Supreme Court of the United States). To bolster the petition an excerpt from the opinion of the Court of Appeals from the Seventh Circuit in Party Cab Co. case was included therein. This statement of the court was to the effect: "That we are presented with a perplexing problem is evident from the opposing results which have been reached and the contrariety of views expressed in a number of cases." Party Cab Co. v. United States, 172 Fed. 2nd, l. c. 88.

The petitioner in the Party Cab Co. case did not go on to the rest of the court's opinion which makes its argument of "a perplexing problem" sterile. We refer to that part of the opinion which continues as follows: "A study of the cases where the question has been considered discloses that varying facts account in no small measure for the contrary results which have been reached. Another factor which has played a large part is the policy pursued by the Social Security Board and courts in the **broadening** of the concept of the term 'employee' and **the consequent inclusion within the coverage of the Act** of a number of

persons who are not in ordinary usage looked upon as employees. Prior to a consideration of the facts in the instant matter, we regard it as important to note this policy of the Board and the courts which was resented by Congress and which in 1948 culminated in certain amendments to the Act expressly designed to restrict its coverage." Party Cab Co., supra, l. c. 88-89.

Grace v. McGruder, 148 Fed. 2nd 679, certiorari denied 326 U. S. 720, presented the same problem from the opposite approach. Here the employer was denied recovery by the United States Court of Appeals for the District of Columbia, and sought certiorari on the grounds that a conflict of laws was presented by the various decisions and that a question of importance was presented. In all four of those cases certiorari was denied. A stronger argument was presented in any one of the four for the issuance of a writ than in the instant case. The brief for the government in opposition to the granting of the writ in Grace v. McGruder admitted a conflict between the decision in that case and the decision in U. S. v. Vogue, 149 Fed. 2nd 609. It continued that the Supreme Court had already denied a rehearing in Glen v. Beard, 141 Fed. 2nd 376, certiorari denied 323 U. S. 724, although there was a conflict between the Vogue case and the Beard case. It concluded, "In these circumstances, and believing the decision below to be correct, we submit that the petition herein should likewise be denied" (p. 6, Brief for Respondent in Opposition to a Writ of Certiorari in Grace v. McGruder, No. 102, October term, 1945, in the Supreme Court of the U. S.). The Supreme Court has denied certiorari unfailingly in similar cases.

A reliable yardstick for measurement of the coverage under the act has been set down by the Supreme Court in the Silk and Greyvan Lines cases. That yardstick has had the approval of the Congress. A defeated party-

litigant always contends that the court applied the wrong principles of law or applied the correct principles of law in the wrong manner. The correct principles of law were followed. It is not the function of a Writ of Certiorari to determine whether the correct principles of law were wrongly applied.

## III.

## CONCLUSION.

It is clear that the United States Court of Appeals for the Eighth Circuit applied the proper tests in reaching the decision in the instant case. Although implied, there is no conflict in decisions. Although implied, no important principle of law is presented for determination. The review of this case by this Court cannot possibly furnish a guide for the decision of other cases which must be decided on the factual situation presented by such other cases. Certiorari is not and should not be granted to review the evidence and to grant a rehearing. Certiorari has been refused by this Court in similar cases involving the identical question here presented.

It is sincerely urged that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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